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No. 85-1560

In the Supreme Court of the United States

OCTOBER TERM, 1985

HERLINDO RUBIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that currency discovered during a search of his automobile at a permanent Border Patrol checkpoint long recognized as the "functional equivalent of the border" should have been suppressed because the officer who conducted the search acted without probable cause.

1. The evidence adduced at trial showed the following (Pet. App. A2-A8). On September 6, 1984, petitioner was stopped at the Sierra Blanca checkpoint, a permanent Border Patrol checkpoint located on Interstate Highway 10 near the international border between the United States and Mexico.[1] The officer at the primary inspection station questioned petitioner about his citizenship. Petitioner stated

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[1]The location and operation of the checkpoint is described in *United States* v. *Hart*, 506 F.2d 887, 896-897 (5th Cir.), vacated and remanded, 422 U.S. 1053 (1975), reaff'd on remand, 525 F.2d 1199 (5th Cir.), cert. denied, 428 U.S. 923 (1976).

that he was Cuban and produced a resident alien registration card and a driver's license. Petitioner then was directed to a secondary inspection station, where he again produced his resident alien card and his driver's license. *Id.* at A2-A3, A18.

One of the Border Patrol officers observed that petitioner appeared to be nervous, and he therefore directed petitioner to open the trunk of the car. Inside the trunk was a small suitcase, which the officer opened and found to contain a locked commercial bank bag. The officer discovered $25,000 in currency inside the bag. Additional large amounts of currency were concealed inside a small metal toolbox that was closed with a combination lock, as well as inside a small portable electric refrigerator. The officer also discovered a vinyl case containing a balance scale; the scale was coated with a white residue that later was found to be cocaine. Pet. App. A3-A7, A18-A19.

2. The government filed a complaint in the United States District Court for the Western District of Texas seeking civil forfeiture of the $127,700 in currency discovered in the trunk of petitioner's automobile. The complaint alleged that the money was subject to forfeiture pursuant to 21 U.S.C. 881(a)(6), because it either had been furnished or was intended to be furnished in exchange for illegal narcotics. The district court denied the forfeiture complaint on the ground that the search of the containers in the trunk of petitioner's car violated the Fourth Amendment (Pet. App. A1-A15). The court found that the government had "established probable cause that a substantial connection existed between the currency and criminal activities proscribed by federal law," but that "the search of the containers found in the vehicle's trunk [was] outside the scope of that permissible by law" (*id.* at A11).

The search was unlawful, the court concluded, because—in the absence of a showing of probable cause—the Fourth Amendment limited the scope of "the search of [petitioner's] vehicle * * * to large areas in which an illegal alien could reasonably be believed to be concealed" (Pet. App. A9). The court found that the Border Patrol officer could not reasonably have believed that the containers concealed illegal aliens, and that the search was not otherwise justified by probable cause (*id.* at A9-A10). The court also stated that "Border Patrol agents simply do not possess the same authority to search as do customs officers" (*id.* at A12). The court therefore ordered the government to return the seized currency to petitioner (*id.* at A14).

3. The court of appeals reversed the district court's judgment in an unpublished opinion (Pet. App. A16-A23). The court of appeals observed that after the district court had issued its decision in the present case, a panel of the Fifth Circuit issued the decision in *United States* v. *Oyarzun*, 760 F.2d 570 (5th Cir. 1985). *Oyarzun* held that "nonprobable cause searches for contraband at [the] Sierra Blanca [checkpoint] are valid border searches because of that checkpoint's legal status as the functional equivalent of the border" (760 F.2d at 576). The court below stated that *Oyarzun* "expressly rejected the contention that nonprobable cause searches conducted at Sierra Blanca are limited to those large areas of a vehicle in which aliens could be hidden" (Pet. App. A21). It concluded that *Oyarzun* established the validity of the search conducted in the present case.

The court of appeals also rejected petitioner's contention that the search in this case was invalid on the ground that Border Patrol agents may conduct a search only if the search is designed to apprehend illegal aliens. It noted that Border Patrol agents " 'wear two hats, one as an immigration officer and the other as a customs officer' " (Pet. App.

A22 (citation omitted)), and concluded that the Border Patrol officer's search for contraband in this case was completely proper (*id.* at A22-A23).

4. The unanimous decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

It is settled that "[r]outine searches of the persons and effects of [travelers entering the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *United States* v. *Montoya de Hernandez*, No. 84-755 (July 1, 1985), slip op. 6 (footnote omitted); see also *United States* v. *Ramsey*, 431 U.S. 606, 616, 619 (1977); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925). These routine border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973)).

The Fifth Circuit consistently has held that the site of the search of petitioner's automobile—the Sierra Blanca checkpoint—is the "functional equivalent of the border." *United States* v. *Oyarzun*, 760 F.2d 570, 574-576 (5th Cir. 1985); *United States* v. *Dreyfus-de Campos*, 698 F.2d 227, 229 (5th Cir.), cert. denied, 461 U.S. 947 (1983); *United States* v. *Luddington*, 589 F.2d 236, 240-241 (5th Cir.), cert. denied, 441 U.S. 936 (1979); *United States* v. *Hart*, 506 F.2d 887, 896-897 (5th Cir.), vacated and remanded, 422 U.S. 1053 (1975), reaff'd on remand, 525 F.2d 1199 (5th Cir.), cert. denied, 428 U.S. 923 (1976). The court has cited, among other factors, the extremely close proximity of

Interstate 10—the road on which the checkpoint is located—to the border with Mexico, and "the ease with which persons in Mexico could cross the Rio Grande River and reach the vicinity of Sierra Blanca without passing through any other inspection station." *United States* v. *Oyarzun*, 760 F.2d at 575; see also *United States* v. *Luddington*, 589 F.2d at 240 ("Interstate 10 roughly parallels the [Rio Grande River] at a distance of 2 to 5 miles along the entire stretch from El Paso to the checkpoint"); *United States* v. *Hart*, 506 F.2d at 896.

Since the Sierra Blanca checkpoint constitutes the functional equivalent of the border, government agents may search automobiles stopped at the checkpoint without a showing of probable cause. *Almeida-Sanchez* v. *United States*, 413 U.S. at 272-273; *United States* v. *Oyarzun*, 760 F.2d at 574-576; *United States* v. *Dreyfus-de Campos*, 698 F.2d at 229. The court of appeals therefore correctly concluded that the search of petitioner's car constituted a border search that was permissible under the Fourth Amendment (Pet. App. A20-A23).

Petitioner's challenge to the decision below is based upon legal principles that simply are not relevant here. Petitioner notes (Pet. 11-17) that in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court concluded that the government's interest in controlling the influx of illegal aliens justified a rule permitting law enforcement officers operating at a fixed checkpoint within the United States to stop a vehicle and inquire as to the citizenship of the occupants without any individualized suspicion as to the occupants of the car (428 U.S. at 560-564). In *United States* v. *Ortiz*, 422 U.S. 891 (1975), on the other hand, the Court had concluded that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." 422 U.S.

at 896-897 (footnote omitted); see also *Martinez-Fuerte*, 428 U.S. at 558, 567.

Petitioner has confused the standard governing searches at checkpoints within the United States with the entirely different standard that applies to searches at the border and its functional equivalents. *Ortiz* makes clear that, while searches upon less than probable cause may not be conducted at a checkpoint located away from the border, the same rule does not apply to a search at the functional equivalent of the border, such as the search at issue in this case. In the latter context, the Fourth Amendment permits searches without probable cause. Thus, petitioner's entire argument rests upon his fact-bound contention that the Sierra Blanca checkpoint is not the functional equivalent of the border.[2]

As a threshold matter, this question is not properly before the Court because petitioner did not previously challenge the status of the Sierra Blanca checkpoint as the functional equivalent of the border. Since the issue was not raised in the court below, it may not now be raised in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).[3]

Moreover, petitioner has presented no facts in support of his challenge to the court of appeals' characterization of the checkpoint. He states (Pet. 33-34) that Interstate 10 does

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[2]The decisions of the courts of appeals cited by petitioner (Pet. 17-20) all relate to checkpoints that were not found to be the functional equivalent of the border.

[3]Petitioner failed to seek rehearing in the court of appeals, even though the Fifth Circuit pointed out in *Oyarzun* that the status of the Sierra Blanca checkpoint was an issue appropriate for review by the en banc court (see 760 F.2d at 576-577).

not cross the international border and that some domestic traffic travels along this route. But these assertions do not undercut the validity of the Fifth Circuit's thorough, repeated analyses of this issue, all of which have reached the conclusion that the Sierra Blanca checkpoint constitutes the functional equivalent of the border (see pages 4-5, *supra*).[4] The search of petitioner's automobile therefore was a border search permissible under the Fourth Amendment without a showing of probable cause.[5]

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[4]Petitioner erroneously asserts (Pet. 23-24) that *United States* v. *Garcia*, 672 F.2d 1349 (11th Cir. 1982), conflicts with these Fifth Circuit decisions. But the search at issue in *Garcia* was upheld as an "extended border search"; the court concluded that the site of the search was not the functional equivalent of the border because it was "neither * * * the place of first landing within the country, nor * * * the first practicable detention point" (672 F.2d at 1366). The court acknowledged that a search may be categorized as a search at the "functional equivalent of the border" if "there is [a] reasonable certainty that the object or person searched has just crossed the border, there has been no time or opportunity for the object to have changed materially since the time of the crossing, and the search is conducted at the earliest practicable point after the border was crossed" (*id.* at 1363-1364). There is little difference between this test and the factors cited by the Fifth Circuit in concluding that the Sierra Blanca checkpoint constitutes the functional equivalent of the border.

[5]Petitioner also contends (Pet. 29-33) that the Border Patrol officers were not authorized to conduct the Customs search in this case because the relevant statute requires that the search be justified by "reasonable cause." First, it is noteworthy that petitioner does not defend the district court's erroneous conclusion (Pet. App. A11-A12) that Border Patrol officers may not conduct Customs searches at the border. The courts of appeals have recognized that Border Patrol officers may conduct border searches authorized by the Customs statutes. *United States* v. *Whiting*, 781 F.2d 692, 696 (9th Cir. 1986); *United States* v. *McDaniel*, 463 F.2d 129, 134 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973).

Second, petitioner's claim is incorrect; the statutes authorizing Customs searches do not all require reasonable cause in order to justify a border search. See 19 U.S.C. 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search"); see also *United States* v. *Montoya de Hernandez*, slip op. 6, 7-8; *United States* v. *Ramsey*, 431 U.S. at 611-615.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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